

APR 12 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

REYNALDO BOTE ABERIN; et al.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-70842

Agency Nos. A72-512-324
A72-512-325
A72-512-326

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 5, 2006**

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Reynaldo Bote Aberin and his family, natives and citizens of the
Philippines, petition for review of the Board of Immigration Appeals' order

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

adopting and affirming an immigration judge's order denying their motion to reopen deportation proceedings conducted in absentia. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, *de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004), and we grant the petition for review.

In light of Petitioners' diligence and cooperation with the government in the prosecution of Jose Mendoza, the agency abused its discretion by not equitably tolling the deadline for filing a motion to reopen until Petitioners discovered the extent of Mendoza's fraud at their adjustment of status interview. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (allowing for equitable tolling of motion deadlines where petitioner acts with due diligence in discovering deception, fraud or error). Moreover, the agency abused its discretion in denying Petitioners' motion to reopen for lack of evidence where the motion was unopposed by the government. *See Konstantinova v. INS*, 195 F.3d 528, 530-31 (9th Cir. 1999) (agency abuses its discretion when it refuses to waive procedural defects for unopposed motions to reopen).

PETITION FOR REVIEW GRANTED; REMANDED.